

A **MOHD RAFIZI RAMLI & ANOR v. PP**
HIGH COURT MALAYA, SHAH ALAM
MOHD YAZID MUSTAFA J
[CRIMINAL TRIAL APPEALS NO: BA-42K-7-03-2018
& BA-42K-8-03-2018]
B 15 NOVEMBER 2019

C **EVIDENCE:** *Admissibility – Documentary evidence – Photocopy – Accused persons convicted for offence of disclosing banking summaries – Photocopies of press statement and banking summaries distributed at press conference – Photocopied documents adduced in court – Whether secondary evidence – Whether admissible as evidence – Evidence Act 1950, ss. 63(b), 64 & 65*

D **BANKING:** *Banking and Financial Institutions Act 1989 – Section 97(1) – Accused persons convicted for offence of disclosing banking summaries – Accused persons sentenced to 30 months' imprisonment – Photocopies of press statement and banking summaries distributed at press conference – Photocopied documents adduced in court – Whether admissible as evidence – Whether conviction and sentence safe – Whether ought to be set aside*

E The first appellant had, in a press conference, revealed and discussed documents comprising balance summaries relating to the National Feedlot Corporation ('NFC'), National Meat & Livestock Sdn Bhd, Agrosience Industries Sdn Bhd and Mohamad Salleh Ismail's Public Bank bank accounts details ('attachments') to Yusof Abdul Alim ('PW4') and Erle Martin Carvalho ('PW5'). The second appellant, a clerk at Public Bank, was also present. The attendees at the press conference were given photocopies of the press statement ('P4') and the attachments. PW4 made some remarks on the documents and handed them to PW2. PW2, upon realising the documents were confidential, instructed PW1 to photocopy them. PW2 then handed over the documents to PW1 who subsequently complained to Bank Negara Malaysia ('BNM'). Following the complaint, BNM conducted an investigation and seized a computer from the second appellant's workplace. Based on the CCTV recording on 16 February 2012, the computer was used by PW13 before the second appellant. At the Sessions Court, (i) the first appellant was charged under s. 97(1) of the Banking and Financial Institutions Act 1989 ('BAFIA') for his conduct; and (ii) the second appellant was charged under s. 112(c), read together with s. 97(1) of the BAFIA, for conspiring with the first appellant. At the conclusion of the trial, the appellants were convicted and sentenced to 30 months' imprisonment. Hence, the present appeal. The first appellant's appeal concerned the admissibility of P4 and the attachments while the second appellant's appeal concerned the failure of the prosecution to prove a *prima facie* case against him.
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Held (allowing appeal; setting aside conviction and sentence):

- (1) The best evidence rule, enshrined in s. 64 of the Evidence Act 1950 ('Act'), provides that the contents of documents must be proved by primary evidence. This means a party seeking to rely on the contents of a document must produce the original where it is in existence and available. Secondary evidence of the contents of a document is inadmissible until the non-production of the original is first accounted for, so as to bring it within one or other of the cases provided for in the section. (paras 13 & 17)
- (2) P4 and the attachments were photocopied documents. The photocopied documents with the handwriting of P4 had been handed over by PW4 to his superior, PW2, who later handed them over to PW3 with the instruction to make a photocopy. After making a photocopy, PW3 had misplaced and lost the documents which she had received from PW2. A photocopy being a copy made from the original, by a mechanical process within the meaning of s. 63(b), is undoubtedly secondary evidence and would be available as evidence only under the combined provisions of ss. 65 and 63(b) of the Act, and would not be, if an explanation is not given why the original is not produced. The explanation must satisfy one of the conditions of s. 65 of the Act. (paras 12 & 19)
- (3) The prosecution should have called a witness to testify that a sufficient search, for the original document of P4, had been carried out. The witness should offer an explanation as to how the original document of P4 was lost or could not be found. The prosecution had called bank officers to testify. However, the evidence of the witnesses failed to fulfil the above requirements in order for P4 to be admitted. Without this evidence, P4 and the attachments were not admissible under s. 65(1)(c) of the Act. (para 20)
- (4) The CCTV footage showed that, on 16 February 2012, the computer was first used by PW13 prior to the second appellant. Based on this piece of evidence, the computer could be accessed and used by anyone else apart from the second appellant to print out the documents. Furthermore, there was no evidence to establish that the second appellant had submitted the documents to the first appellant. The prosecution failed to prove that the second appellant had intended or had knowledge that the first appellant had revealed the contents of the documents in order to commit the offence as per the charge. There was no *prima facie* evidence to relate the involvement of the second appellant. (paras 23, 26, 28 & 29)

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- A (5) The appellants' appeal was allowed and their conviction and sentence of 30 months' imprisonment was set aside. The appellants were acquitted and discharged. (paras 21 & 30)

Case(s) referred to:

- B *Bhubaneswari v. Harisaran* [1881] 6 Cal 720 (*refd*)
KPM Khidmat Sdn Bhd v. Tey Kim Suie [1994] 3 CLJ 1 SC (*refd*)
Krishnakishori v. Kishori 14 IA 71 (*refd*)
Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 HC (*refd*)
Syarikat Jengka Sdn Bhd v. Abdul Rashid Harun [1980] 1 LNS 125 FC (*refd*)
C *Tan Sri Tan Hian Tsin v. PP* [1978] 1 LNS 199 FC (*refd*)

Legislation referred to:

- Banking and Financial Institutions Act 1989, s. 97(1)
Criminal Procedure Code, s. 180
Evidence Act 1950, ss. 63(b), 64, 65(1)(c)
D *Reported by Najib Tamby*

JUDGMENT

Mohd Yazid Mustafa J:

- E Charge against first appellant reads as follows:
Bahawa kamu pada 7 Mac 2012 di Ibu Pejabat Parti Keadilan Rakyat, A-1-09, Merchant Square, No. 1 Jalan Tropicana Selatan 1, 47410 Petaling Jaya, dalam Daerah Petaling, dalam Negeri Selangor, yang mempunyai akses kepada dokumen berhubung dengan hal ehwal akaun di Bank Public Bank Berhad, iaitu:
- F (a) Customer Profile – Balance Summary National Feedlot Corporation Sdn Bhd;
- (b) Customer Profile – Balance Summary National Meat and Livestock Sdn Bhd;
- G (c) Customer Profile – Balance Summary Agrosience Industries Sdn Bhd;
- (d) Customer Profile – Balance Summary Mohamad Salleh bin Ismail, telah menzahirkan dokumen tersebut kepada Yusuf bin Abdul Alim dan Erle Martin Carvelho dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 97(1) Akta Bank dan Institusi-institusi Kewangan 1989 (Akta 372) yang boleh dihukum dibawah seksyen 103(1)(a) Akta yang sama dibaca bersama Nombor Siri 126 dalam Jadual Keempat Akta yang sama.
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Amended charge against second appellant reads as follows;

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Bahawa pada 7 Mac 2012 di Ibu Pejabat Parti Keadilan Rakyat, A-1-09, Merchant Square, No. 1 Jalan Tropicana Selatan 1, 47410 Petaling Jaya, dalam Daerah Petaling, dalam Negeri Selangor, Mohd Rafizi bin Ramli telah melakukan kesalahan menzahirkan dokumen berhubung dengan hal ehwal akaun di Bank Public Bank Berhad, iaitu:

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(a) Customer Profile – Balance Summary National Feedlot Corporation Sdn Bhd;

(b) Customer Profile – Balance Summary National Meat and Livestock Sdn Bhd;

(c) Customer Profile – Balance Summary Agrosience Industries Sdn Bhd;

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(d) Customer Profile – Balance Summary Mohamad Salleh bin Ismail, kepada Yusuf bin Abdul Alim dan Erle Martin Carvelho, di mana kesalahan tersebut telah dilakukan hasil daripada persubahatan kamu dengan mendapatkan dokumen-dokumen tersebut dari Public Bank Berhad Cawangan Jinjang Kuala Lumpur dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 112(c) Akta Bank dan Institusi-institusi Kewangan 1989 (Akta 372) dibaca bersama Seksyen 97(1) Akta yang sama yang boleh dihukum di bawah Seksyen 103 Akta yang sama dibaca bersama Nombor Siri 126 dalam Jadual Keempat Akta yang sama.

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[1] Both the appellants were convicted and sentenced by the learned Sessions Court Judge to 30 months' imprisonment from the date of sentencing (7 February 2018). Dissatisfied with the said decision, the appellants filed appeals to this court.

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[2] For the factual background of this case, I find the learned Sessions Court Judge had set out fully and clearly. (see paras. 3 to 36 of the judgment)

[3] I have read the petitions of appeal of both the appellants and I find the gist of first appellant's petition of appeal is on a point of law where it relates to the admissibility of press statement, P4 and lampiran A to D. The second appellant's petition of appeal is on the failure of the prosecution to prove a *prima facie* case against the second appellant as per amended charge.

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[4] Based on the evidence of the prosecution, SP4 and SP5 had attended the press conference held at the time and place as per the charge in which first appellant revealed and discussed the contents of lampiran A to D with those present. Those present given photocopies of the press statement and the contents of lampiran A to D. PW4 made some remarks on the documents. The documents with remarks made by PW4 were handed over to PW2 who read and found out they were confidential documents in which PW2 later instructed PW3 who was the secretary of PW1 to photocopy them. PW3 noticed that lampiran A to D contained the details of personal account of

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- A PW1 and his family's accounts with Public Bank with which she was very familiar. PW2 then handed over the documents to PW1. Subsequently, PW1 wrote a letter to Bank Negara Malaysia (BNM) and lodged police report on this issue.
- B [5] PW6 (Director Human Capital Management Public Bank) and PW9 (Branch Manager of Public Bank's Jinjang) confirmed that second appellant was a clerk with a Public Bank Jinjang's branch who was attached to the Credit Unit Processing/Review Bill and the scope of his work was to process the loan application.
- C [6] As a result of the complaint by PW1, BNM had conducted investigation and seized a computer from the workplace of second appellant. Based on CCTV recording on 16 February 2012, PW13 used the computer before the second appellant used it.
- D [7] Based on the above facts, the learned Sessions Court Judge made a finding of facts that the prosecution has proved that the first appellant had accessed to the documents in relations to Hal Ehwal Akaun of the Public Bank namely lampiran A to D. He further satisfied that the first appellant had revealed the above said documents to Yusuf bin Abdul Alim (PW4) and Erle Martin Carvelho (PW5) on the date and place as per charge.
- E [8] The learned Sessions Court Judge had ruled that there was no necessity for the prosecution to prove *mens rea* under s. 97(1) BAFIA as it is a strict liability offence. Under s. 97(1) BAFIA, it is clearly stated that there is a requirement to establish the *actus reus* of the said offence, which means that when someone has access to the said documents and subsequently reveals any
- F information relating to the affairs of an account of such customer of itself is an offence under s. 97(1) BAFIA. I agree with this finding.
- G [9] The learned Sessions Court Judge also made a finding that the prosecution has established a *prima facie* case on the amended charge against the second appellant whereby the second appellant had wrongly extracted lampiran A to D from BDS Public Bank Jinjang's branch and the said lampiran was later revealed by first appellant at the press conference held on 7 May 2015.
- H [10] Both the appellants elected to give evidence on sworn oath. At the end of defence case, the learned Sessions Court Judge held that the defence of the second appellant had failed to raise a reasonable doubt on the prosecution's case as it was a mere denial. For the first appellant, the learned Sessions Court Judge made the finding that it was impossible for the first appellant who was highly educated and experienced person not to be aware of the confidentiality of the said documents. Hence, the learned Sessions Court
- I Judge found that the first appellant had failed to cast a reasonable doubt on the prosecution's case.

[11] Based on the petitions of the appeal and the written submission of the learned counsel for the first appellant, I find that the main issue pertaining to charge against the first appellant is purely on point of law.

[12] After reading the evidence of the prosecution witnesses especially PW4, PW2 and PW3, I find that the press statement, P4 and the documents of lampiran A to D are photocopied documents. There are some handwriting of P4 on the said photocopied documents. The photocopied documents with the handwriting of P4 had been handed over by PW4 to his superior, PW2 who later handed over to PW3 with the instruction to make a photocopy. After making of a photocopy, PW3 had misplaced and lost the said documents which she had received from PW2. At this juncture, the main issue for the court to decide is whether the said documents which were photocopied and received by PW4 was correctly admitted and marked as P4 together with lampiran A to D.

[13] Here, I find it is necessary to set out the principles applicable on the mode of tendering and proving the contents of documentary evidence. Chapter 5 of the Evidence Act 1950 deals with the mode of proving documentary evidence. The provisions in this chapter have been extensively considered and construed in numerous decisions. I start with the best evidence rule enshrined in s. 64 of the Act which provides that the contents of documents must be proved by primary evidence. This means a party seeking to rely on the contents of a document must produce the original where it is in existence and available.

[14] The importance of this rule is illustrated by the judgment of Edgar Joseph Jr J (as he then was) in *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635; [1989] 3 MLJ 360. In that case, the plaintiff company tried to prove its claim for damages for loss of profits by calling as a witness its accountant. The accountant who testified produced a sheet of calculations (exh. P76) which was meant to show the estimated losses suffered by the plaintiff as a consequence of the defendant's failure to deliver the goods. The plaintiff contended that the oral testimony of the accountant and his calculations as tendered to court were based on the results of his examination of the account books of the plaintiff. The account books were never produced and the defendant never dispensed with formal proof of the loss of profits claimed by the plaintiff. The non-production of the books of account, the original document, was held to be fatal to the claim of the loss of profits.

In his judgment, Edgar Joseph Jr J explained as follows:

It is a firmly established rule (to which there are exceptions) requiring that when documentary evidence is tendered, primary evidence of the document, that is to say the production of the documents itself is essential (see s. 65 of the Evidence Act).

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- A In the present case, the plaintiffs made not the slightest attempt to discharge that burden, with the result that P76 which was alleged to be extracted from the books of accounts of the plaintiffs, which were never produced, was inadmissible in evidence. Similarly, the oral evidence of the accountant Mr So, which was based on P76, was also inadmissible for the same reason.
- B [15] Section 65 of the Act allows the admission of copies of the original document to be produced to prove its existence, condition and contents. It reads:
- C (1) Secondary evidence may be given of the existence, condition or contents of a document admissible in evidence in the following cases:
- (a) where the original is shown or appears to be in the possession or power
- (i) of the person against whom the document is sought to be proved;
- D (ii) of any person out of reach of or not subject to the process of the court; or
- (iii) of any person legally bound to produce it,
- and when after the notice mentioned in s. 66 such person does not produce it;
- E (b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;
- F (c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot for any reason not arising from his own default or neglect produce it in reasonable time;
- (d) when the original is of such a nature as not to be easily movable;
- (e) when the original is a public document within the meaning of section 74;
- G (f) when the original is a document of which a certified copy is permitted by this Act or by any other law in force for the time being in Malaysia to be given in evidence;
- (g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection.
- H (2)(a) In the cases referred to in sub-s. (1)(a),(c) and (d) any secondary evidence of the contents of the document is admissible.
- (b) In the case referred to in sub-s. (1)(b), the written admission is admissible.
- I (c) In the case referred to in sub-s. (1)(e) or (f) a certified copy of the document but no other kind of secondary evidence is admissible.

(d) In the case referred to in sub-s. (1)(g), evidence may be given as to the general result of the documents by any person who has examined them and is skilled in the examination of such documents.

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[16] The then Supreme Court had occasion to deal with the scope of s. 65 in *KPM Khidmat Sdn Bhd v. Tey Kim Suie* [1994] 3 CLJ 1; [1994] 2 MLJ 627. His Lordship Gunn Chit Tuan SCJ (as he then was) in delivering the judgment of the court said at p. 5 (CLJ); p. 632 (MLJ):

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On the principle and scope of s. 65, we respectfully rely on the commentary in *Sarkar on Evidence* (at pp. 964-965):

... (But) secondary evidence of an ordinary document is admissible only when the party desirous of admitting it has proved that he has no possession or control of it and further that he has done what can be done to procure the production of it. He has to account for the non-production in one of the ways indicated in this section (*Krishnakishori v. Kishori* 14 IA 71, 14 C 486; *Shambati v. Jogo* 29 C 749; *Bhubaneswari v. Harisaran* 6 C 720). When original account books are available copies are not admissible (*Jainarain v. Zubeda A* 1972 A 494).

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Exceptions (a) and (c) rest upon the principle that a party tendering a copy has done all that lies in his power to produce the original.

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[17] Thus, basically, secondary evidence of the contents of a document is inadmissible, until the non-production of the original is first accounted for, so as to bring it within one or other of the cases provided for in the section (*Krishnakishori v. Kishori* 14 IA 71; and *Bhubaneswari v. Harisaran* [1881] 6 Cal 720).

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[18] In *Tan Sri Tan Hian Tsin v. PP* [1978] 1 LNS 199; [1979] 1 MLJ 73, the secondary evidence in the form of photostat copies was admitted after the Federal Court was satisfied that a sufficient search was made and the originals could not be discovered. Justice Chang Min Tat FJ had this to say:

Now what were produced in court was not the original Tatung's documents but photo-stat copies thereof which Ho, in his disquiet about the propriety of the whole transaction, made for his own protection, and then kept in his personal file. The question of admissibility arose. Ho said that the originals were with Folex and of course, being **primary** evidence, the originals should be produced. But there was evidence from Joseph Tay that after a search of the Company's records which he carried out at the request of the Police, he could not discover the originals and in the circumstances, secondary evidence of the documents becomes available under the combined provisions of section 65 and 63(b) of the Evidence Act 1950. (emphasis added)

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[19] A photocopy, being a copy made from the original by a mechanical process within the meaning of s. 63(b), is undoubtedly secondary evidence, and would be available as evidence only "under the combined provisions of

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A ss. 65 and 63(b) of the Evidence Act 1950” (see *Tan Sri Tan Hian Tsin v. PP* [1978] 1 LNS 199; [1979] 1 MLJ 73 at 76], and would not be if an explanation is not given why the original is not produced (see *Syarikat Jengka Sdn Bhd v. Abdul Rashid Harun* [1980] 1 LNS 125; [1981] 1 MLJ 201). The explanation must of course satisfy one of the conditions of s. 65.

B [20] Thus, the prosecution should have called a witness to testify that a sufficient search for the original document of P4 was carried out. Moreover, the witness should offer an explanation as to how the original document of P4 was lost or could not be found. The prosecution had called bank officers to testify, however the evidence of the witnesses failed to fulfill the above requirement in order for P4 to be admitted under the above requirements.
C Without this evidence, these document P4 and lampiran A-D are not admissible under s. 65(1)(c) of the Evidence Act 1950.

D [21] Based on the above reasons, I hereby allow the appeal of first appellant and set aside the conviction and sentence of 30 months imprisonment imposed by the learned Sessions Court Judge. I hereby order an acquittal and discharge of the first appellant.

E [22] Now coming to the second appellant’s case, I have scrutinised the evidence of the prosecution witnesses where this court finds that PW13, the assistant manager of the Public Bank in Jinjang branch had accessed to the said account of PW1, particularly lampiran A to D. Without the consent of PW13, the second appellant had no access to the said accounts of PW1. During cross-examination, PW13 has agreed that he had breached the rules and regulations of the bank by sharing his personal computer ID with others. Based on this, I find in this case, the second appellant had access to the above documents.
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G [23] Furthermore, the CCTV footage showed that at the material time on 16 February 2012 the computer was first used by PW13 prior to second appellant. Based on this piece of evidence, learned counsel for the second appellant had submitted that the computer can be accessed and used by anyone else apart from second appellant to print out the above documents. This court agreed with this submission.

H [24] The prosecution’s case against second appellant was also collapsed by reason of evidence of PW19 who was the investigation officer. PW19 in his evidence agreed with the learned defence counsel that the initial investigation showed the main suspect was PW13.

[25] This material evidence was not considered at all by the learned Sessions Court Judge in his judgment.

I [26] The second appellant’s learned counsel further submitted that there was no evidence to establish the second appellant had submitted the said documents to the first appellant. As to that, the PW19 who is the

investigation officer from Bank Negara had agreed during cross-examination that the second appellant had never contacted, met or handed over the above documents to the first appellant.

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[27] The above evidence as per para. [26] was also not considered by the learned Sessions Court Judge in his judgment.

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[28] Based on the above reasons, it is obvious that the prosecution has failed to prove that the second appellant had intended or had knowledge that the first appellant had revealed the contents of the said documents in order to commit the offence as per the charge. The conviction and sentence of the second appellant is hereby set aside.

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[29] I find as a whole that there is no *prima facie* evidence to relate the involvement of the second appellant in this case. It is trite law that a *prima facie* case means that there is sufficient credible evidence to establish the elements of the said charge against the second appellant. Case law and s. 180 of Criminal Procedure Code clearly stated the requirement in establishing a *prima facie* case against the second appellant.

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[30] I hereby allow the appeal of the second appellant as there is no *prima facie* case against second appellant and set aside the conviction and sentence of 30 months' imprisonment. I hereby acquit and discharge the second appellant of the amended charge.

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